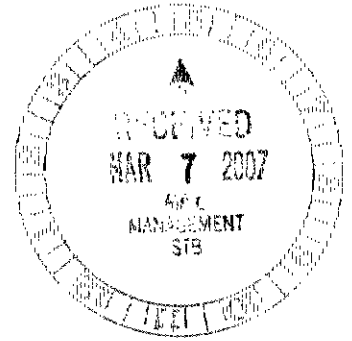


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March 7, 2007

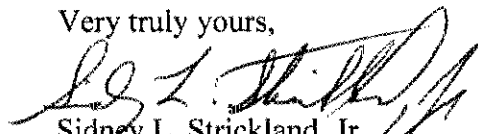
Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit
395 E Street, S.W.
Washington, DC 20423-0001

**Re: STB Docket No. AB-6 (Sub-No. 430X) BNSF Railway Company—
Abandonment Exemption—in Oklahoma County, OK**

Dear Mr. Williams:

Enclosed please find an original and 10 copies of an Opposition to the Petition to Reopen/to Reconsider.

Very truly yours,

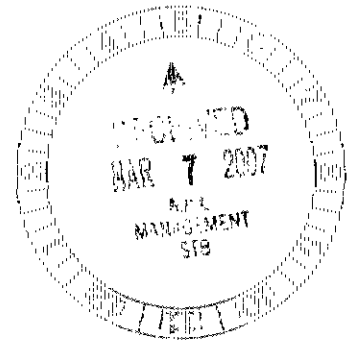

Sidney L. Strickland, Jr.
Attorney for BNSF Railway Company

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BEFORE THE
SURFACE TRANSPORTATION BOARD



**BNSF RAILWAY COMPANY --
ABANDONMENT EXEMPTION --
IN OKLAHOMA COUNTY, OK**

**STB DOCKET NO. AB-6
(SUB-NO. 430X)**

OPPOSITION TO PETITION TO REOPEN/TO RECONSIDER

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Attorneys for BNSF Railway Company

DATED: March 7, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**BNSF RAILWAY COMPANY --
ABANDONMENT EXEMPTION --
IN OKLAHOMA COUNTY, OK**

**STB DOCKET NO. AB-6
(SUB-NO. 430X)**

OPPOSITION TO PETITION TO REOPEN/TO RECONSIDER

BNSF RAILWAY COMPANY ("BNSF") hereby moves for denial of the February 21, 2007 petition by Edwin Kessler to reopen/to reconsider ("Petition).

The Petition should be denied because: (1) Mr. Kessler has not met the standards for reopening; (2) the Board's January 26, 2007 decision does not contravene precedent; and (3) the Petition constitutes an impermissible reply to a reply.

Background

On September 23, 2005, BNSF and SLWC jointly filed Notices seeking to invoke the class exemption under 49 C.F.R. § 1152, Subpart F for BNSF to abandon, and for SLWC to discontinue service over, approximately 2.95 miles of railroad between milepost 539.96 and milepost 542.91 in Oklahoma City, Oklahoma County, OK. Notice of the exemptions was served and published in the Federal Register on October 13, 2005 (70 FR 59802).

On November 7, 2005, Oklahoma State Representative Al Lindley ("Representative Lindley") and Bio-Energy Wellness Center ("Wellness Center or the Center") filed comments urging that the Notices be rejected. On November 9, 2005,

petitioners Wellness Center and North American Transportation Institute ("NATI") filed a joint petition to reject the Notices of exemption. BNSF and SLWC replied to those filings on November 10, 2005.

The BNSF abandonment Notice became effective on November 12, 2005.

Subsequently, the parties filed various pleadings related to the request to reject the Notices through February 2006.

On January 26, 2007, the Board served a decision ("January 26, 2007 Decision") denying petitioners' motion to reject the BNSF Notice and granting SLWC an exemption permitting it to discontinue service over the line. In that decision, the Board also ordered that an OFA to subsidize continued rail service in the SLWC discontinuance proceeding must be received by the railroads and the Board by February 5, 2007.

On February 5, 2007, CCO filed a Request for Extension of Time to File an Offer of Financial Assistance ("Request") requesting a two week extension of time to "obtain additional information" related to a possible "offer for purchase of the two and a half mile segment of railroad" and "the prospect of obtaining sufficient money from interested investors."

On February 7, 2007, BNSF and SLWC jointly filed a Motion to Reject Request For Extension of Time to File an OFA ("Motion to Reject") arguing that CCO missed the October 24, 2005 deadline to submit a formal expression of intent to file an OFA and failed to file an OFA before the Notice of Exemption became effective in STB Docket No. AB-6 (Sub-No. 430X). BNSF and SLWC also argued that CCO seeks an extension

to file an OFA to acquire the rail lines over which SLWC is discontinuing operations in STB Docket No. AB-1040X, which is not permitted in a discontinuance proceeding.

On February 12, 2007, Mr. Kessler filed a Petition to Toll Date an Offer of Financial Assistance Must Be Filed By ("Petition to Toll Date"). In that Petition, Mr. Kessler states that on February 12, 2007, he sent a Notice of Intent to File an OFA ("OFA Notice") to BNSF, requesting information regarding the Line. Mr. Kessler claims that the time period within which an OFA must be filed is 30 days from the Board's January 26, 2007 decision and not 30 days from the date of the Federal Register notice of BNSF's Notice of Exemption.

On February 13, 2007, Mr. Kessler filed a Notice of Intent to File an Offer of Financial Assistance to purchase from BNSF the 2.95 miles of rail line between milepost 539.96 and milepost 542. 91, which is the subject of BNSF's abandonment proceeding.

On February 20, 2007, BNSF and SLWC jointly filed a Motion to Reject Petition to Toll Date an Offer of Financial Assistance Must Be Filed By, arguing Mr. Kessler and CCO missed the November 12, 2005 deadline to file an OFA and missed the February 5, 2007 deadline to file a subsidy OFA in the discontinuance proceedings. BNSF and SLWC also argued that Mr. Kessler is not seeking to acquire the Line to provide continued freight service but is instead seeking to stop a highway project.

On February 21, 2007, Mr. Kessler filed his Petition, claiming the Board's January 26, 2007 Decision in this proceeding should be reopened and then reconsidered, because the January 26, 2007 Decision contravenes precedent and was not persuasively distinguished.

Finally, on February 27, 2007, the Board served a decision (“February 27, 2007 Decision”) denying CCO’s requests for an extension of time to file an OFA and for tolling the OFA due date. The Board noted in the decision that BNSF’s abandonment in STB Docket No. AB-6 (Sub-No. 430X) became effective in November, 2005.

Argument

1. Mr. Kessler Has Not Met the Standards for Reopening

In seeking to reopen the Board’s January 26, 2007 administratively final order, Mr. Kessler must show in detail that the Decision involves material error, new evidence, or substantially changed circumstances. *See* 49 C.F.R. 1115.4 and 49 C.F.R. 1152.25(e)(4).

Mr. Kessler’s Petition does not meet the standards for reopening the proceeding. The Petition does not allege material error, new evidence, or changed circumstances. Without such allegations, there is no basis to reopen the Board’s Decision. Mr. Kessler’s Petition argues only that the Decision contravenes precedent. However, Mr. Kessler’s Petition is simply the latest filing in a series of similar attempts to manipulate and attenuate the Board’s procedural processes. Indeed, the Petition is yet another example of Mr. Kessler’s quest to create delay and confusion so as to holdup a highway project under the guise of seeking continued rail service for non-existent shippers. Mr. Kessler had the opportunity to monitor and participate in this proceeding way back in 2005 when notice of the exemption was first published in the Federal Register. Importantly, the Board’s February 27, 2007 Decision explicitly states, “if CCO (or anyone else) had wanted to file an OFA to acquire BNSF’s line in Oklahoma City, it had the opportunity to

do so in November, 2005.” See February 27, 2007 Decision at 4. Mr. Kessler’s last minute attempt to reopen the Board’s January 26, 2007 lacks support and explanation as required by the Board’s rules and by no means supports any finding of material error, new evidence, or changed circumstances.

As explained further below, the Petition fails to describe the manner in which the alleged contravention of precedent constitutes material error, new evidence, or changed circumstances.

2. The Board’s January 26, 2007 Decision Does Not Contravene Precedent

The Board’s January 26, 2007 Decision does not contravene precedent as Mr. Kessler claims.

Mr. Kessler relies on two cases for his assertions: *Consolidated Rail Corp.—Abandonment Exemption—In Mercer County, NJ*, STB Docket No. AB-167 (Sub-No. 1185X) (Served January 22, 2007) (“Mercer County”) and *New York Cross Harbor R.R. v. STB*, 374 F.3d 1177 (D.C. Cir. 2004), citing to *Louisiana Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 897 (D.C. Cir 1999).

Mercer County does not constitute precedent for the Board’s January 26, 2007 Decision because it is distinguishable. As noted in the Board’s February 27, 2007 Decision: “In Mercer County, an OFA offeror timely filed a notice of intent to file an OFA within 10 days after the notice of exemption was published in the Federal Register, in accordance with 49 CFR 1152.27(c)(2). Here, CCO failed to do so.” February 27, 2007 Decision at 3. The Board’s February 27, 2007 Decision did note that

based on *Mercer County*, an abandonment may not be consummated until all operating rights over the line are distinguished, and therefore, “as long as SLWC’s operating rights remain in effect, BNSF may not consummate the abandonment of its 2.95-mile segment.” February 27, 2007 Decision at 3. The Board’s February 27, 2007 Decision also properly distinguished *Mercer County* from the current proceeding as follows:

But that fact does not lead to the result that CCO seeks, because, as noted, the 10-day deadline for filing an OFA notice of intent runs from the date the notice of exemption is published, not the date the abandonment is consummated. That BNSF cannot consummate the abandonment until SLWC’s operating rights are extinguished does not alter the fact that the deadline for OFA notices of intent to acquire the line expired in 2005.

February 27, 2007 Decision at 3.

Clearly, *Mercer County* has no precedent applicable to this proceeding.

Finally, Mr. Kessler cites to *New York Cross Harbor* to support his claim that the Board “acts arbitrarily and capriciously if it ‘reverses its position in the face of a precedent it has not persuasively distinguished,’ citing to *Louisiana Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 897 (D.C. Cir 1999).” *Id.* at 1181. As stated above, the Board’s January 26, 2007 Decision did not reverse the Board’s positions in *Mercer County*, and thus, the Board’s January 26, 2007 Decision was not arbitrary and capricious for failing to distinguish *Mercer County*.

3. The Petition Constitutes an Impermissible Reply to a Reply

Mr. Kessler’s Petition is in violation of 49 CFR 1104.13(c), which provides: “[a] reply to a reply is not permitted.” Mr. Kessler’s February 21, 2007 Petition is tantamount to an impermissible reply to a reply. Specifically, in his February 21, 2007 Petition,

Mr. Kessler makes the same arguments he made in his February 7, 2007 Petition to Toll Date, clearly in response to BNSF's February 20, 2007 filing that responded to Mr. Kessler's February 7, 2007 Petition to Toll Date.

In his Petition, Mr. Kessler argues, for the second time, that *Mercer County* is precedent in this proceeding and “[p]ursuant to Board’s *Robbinsville* [aka *Mercer County*] precedent, BNSF’s AE could not become effective prior to the effective date of SLWC’s DSE.” Petition at 3. Kessler makes the exact same argument in his February 7, 2007 Petition to Toll Date. In that filing, Mr. Kessler argues:

The Board, in its January 26, 2007 Decision in this case, created a situation in which it contravenes the Board’s *Delaware and Hudson* and *Robbinsville* decisions: By granting BNSF’s AE, the Board granted BNSF the right to abandon the line effective November 12, 2005. Unfortunately, since SLWC’s DSE was denied, from November 12, 2005, the effective date of BNSF’s AE, through January 26, 2007, SLWC still had common carrier obligation over the line. And, pursuant to the Board’s *Delaware and Hudson* decision, the line that is the subject of this proceeding, was not subject to the Board’s OFA procedures prior to January 26, 2007.

Petition to Toll Date at 3.

In both filings, Mr. Kessler argues that the effective date of the abandonment and corresponding OFA procedures did not occur until January 26, 2007. This second iteration is after BNSF and SLWC replied to the first iteration. In this context, Kessler’s Petition is tantamount to an impermissible reply to a reply. The Board and its predecessor have routinely held that the filing of a reply to a reply is impermissible and violates Section 1104.13. See, e.g., Northeast Interchange Ry., LLC—Lease and Operation Exemption—Line in Croton-on-Hudson, NY, STB Docket No. 34734 (STB served November 18, 2005); CSX Transp., Inc.—Abandonment Exemption—in Franklin

County, PA, STB Docket No. AB-55 (Sub-No. 568X) (STB served July 28, 2005); CSX Corp.—Control—Chessie System, Inc., 2 S.T.B. 554 (1997); St. Louis S.W. Ry. Co.—Trackage Rights Over Missouri Pac. R.R. Co.—Kansas City to St. Louis Trackage Rights Compensation, 4 I.C.C.2d 668 (1987).


Accordingly, BNSF and SLWC respectfully request the Board strike Mr. Kessler's February 21, 2007 Petition as an impermissible reply to a reply.

Conclusion

Mr. Kessler's Petition should be denied for failing to show reversible material error, new evidence or changed circumstances that permit reopening/reconsideration of this proceeding. The Petition should otherwise be stricken as an impermissible reply to a reply.

Respectfully submitted,

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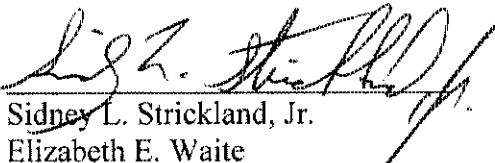

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Attorneys for BNSF Railway Company

DATED: March 7, 2007

CERTIFICATE OF SERVICE

BNSF Railway Company by and through its counsel, Sidney L. Strickland, Jr., certifies that on March 7, 2007, BNSF served a copy of the foregoing "Opposition to Petition to Reopen/to Reconsider" by facsimile transmission and by mailing copies thereof by first-class mail to Edwin Kessler at: Common Cause *Oklahoma*, 1510 Rosemont Drive, Norman, Oklahoma, 73072, and to Karl Morell at: Ball Janik LLP, 1455 F Street N.W., Suite 225, Washington, D.C. 20005



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